

circumstances, the Commission concludes that there is a **substantial likelihood** that the allegations bear upon the operations of other stations, it will take appropriate action to advise the [licensee] that assignment applications will not be entertained.

Grayson, supra, at para. 10 (emphasis added). Notably, the doctrine announced in Grayson provided that the Commission would settle the issue regarding the impact of the hearing on other related licenses **at the time of the designation for hearing**. Indeed, in James S. Rivers, 48 Fed. Reg. 8585 (March 1, 1983), the Commission modified the Grayson policy to require designation of all potentially affected stations for hearing if the charges are serious enough to implicate "uninvolved" facilities.^{14/}

14. Several considerations compel the conclusion that the conduct at issue in the MobileMedia proceeding should not be deemed to prevent the processing of applications, particularly assignment applications, involving Western. First, to date there has been no finding, preliminary or otherwise, that Hellman and Friedman was an active participant in the wrongdoing of MobileMedia.

^{14/} Based upon this precedent, the failure to name Western or any Western licenses as being subject to the Show Cause Order should be deemed dispositive of the Triad Petition for Partial Reconsideration, and the stay should be lifted as to all Western applications including the Triad/Western assignment.

Consequently, the Commission can find no substantial likelihood that the false filings at issue in the MobileMedia case are likely to crop up again in other companies in which Hellman & Friedman has an interest.

15. Second, since Hellman & Friedman is not in a position to control the day-to-day operations of Western, there is absolutely no basis to conclude that Hellman & Friedman's participation in Western is likely to lead to rule violations. Thus, even if Hellman and Friedman had been identified as a wrongdoer in the MobileMedia case -- which has not occurred -- the Commission could not find a substantial likelihood that this conduct would be repeated by Western in which Hellman & Friedman holds only a minority non-controlling position. In this regard, Triad notes that Western is a licensee of long standing with a substantial record of public service.

16. Third, since the Commission did not identify Western's licensee qualifications as being in issue when it designated MobileMedia for hearing, and did not identify any Western licenses as being subject to the outcome of the hearing, the application of the Grayson doctrine as modified by James S. Rivers compels a finding that Western's applications and licenses are not properly placed in issue by the Stay Order. Had the MobileMedia revocation

proceeding been fully adjudicated and resolved adversely to MobileMedia, the only immediate sanction that could have been imposed would have involved the MobileMedia stations which were designated for hearing in the case. Having decided for valid public interest reasons to stay the MobileMedia proceeding with no preliminary or final determination of wrongdoing by Hellman & Friedman, the Commission cannot and should not extend the reach of the proceeding to uninvolved stations and licensees.

V. The Commission Retains Jurisdiction

17. The issue of whether a revocation proceeding involving one station affects the assignment or transfer of an "uninvolved" station generally arises when the licensee, or principals of the licensee, involved in the identified wrongdoing are seeking to sell an uninvolved station. See, e.g. Grayson, supra, Cellular System One Of Tulsa, supra, Straus Communications, Inc., 2 FCC Rcd. 7469 (1987). This factual scenario raises sensitive public interest issues because a party who lacks basic licensee qualifications could end up profiting from the sale, and the wrongdoer's holdings in the uninvolved station would, after the Commission-approved sale, become beyond the reach of the Commission in an enforcement action.

18. No such issues pertain to the proposed acquisition of Triad by Western. Since Triad has no officers, directors or shareholders in common with MobileMedia, allowing Triad to benefit from the sale of the stations it has worked long and hard to develop raises no issue of unjust enrichment. All that will have happened is that the number of Western stations in which Hellman & Friedman has an interest -- and which remain subject to the Commission's continuing enforcement authority in the unlikely event that additional sanctions against Hellman & Friedman are necessary and appropriate^{15/} -- will have increased. Thus, allowing the Triad/Western assignment to go forward does not in any way undermine the deterrent authority of the Commission, or reduce its jurisdiction to enforce an appropriate sanction against Hellman & Friedman.

VI. Less Severe Sanctions Have Been Imposed in Other Related Circumstances

19. Triad appreciates the severity of the misconduct that is at issue in the Mobilemedia proceeding. Yet, the conduct is not completely unprecedented in either nature or scope. And, there are potentially mitigating

^{15/} It is well established that the Commission has the authority to take action against the owner of other related stations if the record after a hearing discloses conduct more serious than initially perceived. See Grayson, supra, 79 FCC 2d at 940.

factors at play in the Mobilemedia case that were not present in other instances of serious licensee wrongdoing. For these reasons, the Commission, in fashioning an appropriate regulatory response to the situation, should not abandon the measured, balanced approaches that have been taken in other cases.

20. The core conduct at issue in the Mobilemedia case is falsely certifying the operational status of stations in order to preserve licenses and qualify for additional facilities. Similar conduct was at issue in the radio common carrier revocation proceedings involving Otis L. Hale d/b/a/ Mobilfone Communications^{16/} and PassWord, Inc.^{17/}. While the Commission did ultimately decide that this conduct was sufficiently egregious to warrant the revocation of all commonly-controlled stations of the wrongdoer, it did not extend the sanction to other station licenses in which principals had non-controlling attributable interests. Since, the MobileMedia Show Cause Order already sweeps within its ambit all of MobileMedia's stations, including uninvolved stations, the approach the

16/ See Otis L. Hale, 89 FCC 2d 400 (1985) and related cases cited therein.

17/ PassWord, Inc. 76 FCC 2d 476 (1980), recon., 86 FCC 2d 437 (1981), aff'd sub nom. PassWord, Inc. v. FCC, 673 F.2d 1363 (D.C. Cir. 1982).

Commission has taken is consistent with the hard line taken in earlier wireless false certification cases without involving Western or Triad.

21. To be sure, the number of false filings made by MobileMedia was substantial, but this too is not unprecedented. In CC Docket Nos. 82-587 through 82-590, the Commission designated for hearing over 600 paging applications in approximately 50 major markets throughout the United States to determine whether the Graphic Scanning Corporation ("Graphic") was the undisclosed real party-in-interest behind the applications.^{18/} In an Initial Decision, FCC 85D-3, released January 9, 1985, the administrative law judge found that Graphic was indeed the real party-in-interest behind the applications, and that the "straw-men" applicants and Graphic were lacking in candor and intentionally misrepresented material facts to the Commission. Despite the scope of the false filings and the severity of the adjudicated conduct, the Commission ultimately decided to limit the sanction to the dismissal of the fraudulent applications. ASD Answer Service Inc. et al., FCC 86-519, released November 21, 1986. In a

^{18/} Due to the Commission's processing rules, Graphic was not eligible in its own right to file for the requested stations, and thus created a series of "strawmen" to file on its behalf.

particularly instructive ruling, the Commission decided that the wrongdoing at issue with respect to the paging applications and licenses would not be imputed to cellular licenses in which Graphic had an interest:

We note that the conduct which concerns the Commission in [the ASD proceeding] was limited to radio paging services. It did not involve cellular radio, a service whose exceptional importance has been recognized repeatedly by the Commission. . . . [T]he imposition of restrictions or conditions on the transfer of [Graphic's cellular] interests threatens to frustrate the public interest in the development of efficient and competitive cellular systems. Balancing these public interest considerations favoring the rationalization and realignment of cellular interests (to promote efficient operation and effective competition) against our interest in deterrence . . . we find that the interest in deterrence is outweighed by the more immediate and substantial public interest in the development of efficient and competitive cellular systems.

Cellular System One of Tulsa, 102 FCC 2d 86, Para. 10 (1985).

22. The same reasoning compels the conclusion that the public interest benefits of allowing the Triad/Western assignment to proceed without delay far outweigh any deterrent value of holding all Western licensing in abeyance. The authorization of MTA-based PCS systems has increased the need for adjacent cellular systems to consolidate in order to remain competitive. And the

costs associated with the conversion to digital cellular technology have increased the economies of scope that must be achieved for cellular systems to compete effectively. If anything, the public interest benefits in allowing cellular consolidations to proceed have increased, not decreased, over time.

23. The Commission also should note that there are possible mitigating factors involved in the MobileMedia case that were not at work in prior wireless revocation proceedings. The licensing violations at issue in the Mobilemedia case were voluntarily disclosed to the Commission. In contrast, the serious wrongdoing at issue in the Otis Hale, PassWord and ASD proceedings was brought to the Commission's attention by third parties, and was initially denied by the licensees. If anything, the voluntary disclosure by MobileMedia should lead to a less severe rather than a more severe outcome with respect to uninvolved stations.

24. Additionally, the Commission should note that Hellman & Friedman, the largest economic interestholder in Mobilemedia, already has suffered huge financial losses as a result of the collapse of the MobileMedia stock price and the fact that the company was forced into bankruptcy. Interrupting the Triad/Western sale is not necessary to

punish Hellman & Friedman (if indeed such punishment is warranted which it has not been shown to be.) If the Commission insists on dragging the Triad/Western assignment into the ambit of the Stay Order, all it will have succeeded in doing is adding other completely innocent parties (i.e. Triad principals and Western shareholders other than Hellman & Friedman) to the list of those innocent third parties who have already been victimized by the wrongdoing in the Mobilemedia case.

CONCLUSION

The foregoing premises having been duly considered, Triad respectfully requests that Paragraph 18 of the Stay Order be modified, limited or clarified in order to permit the Triad/Western assignment applications to be processed and granted by the wireless Telecommunications Bureau without further delay.

Respectfully submitted,

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July 7, 1997

CERTIFICATE OF SERVICE

I, Diane Mimiaga, a secretary in the law offices of Paul, Hastings, Janofsky & Walker LLP, do hereby certify that I have on this 9th day of July, 1997, had copies of the foregoing Errata sent by first-class postage pre-paid mail or by hand-delivery^{1/} to the following:

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